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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/530,795	06/25/2000	BRIAN C. KELLER	270142000300	4731

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BRUCE GRANT  
MORRISON & FOERSTER LLP  
3811 VALLEY CENTRE DRIVE  
SUITE 500  
SAN DIEGO, CA 92130

EXAMINER

ART UNIT PAPER NUMBER

DATE MAILED: 03/10/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

**Notification of Non-Compliant Appeal Brief  
(37 CFR 41.37)**

Application No.

09/530,795

Applicant(s)

KELLER ET AL.

Examiner

Keith Hendricks

Art Unit

1761

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address--**

The Appeal Brief filed on 5/31/05 is defective for failure to comply with one or more provisions of 37 CFR 41.37.

To avoid dismissal of the appeal, applicant must file an amended brief or other appropriate correction (see MPEP 1205.03) within **ONE MONTH or THIRTY DAYS** from the mailing date of this Notification, whichever is longer.

**EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136.**

1. ☐ The brief does not contain the items required under 37 CFR 41.37(c), or the items are not under the proper heading or in the proper order.
2. ☐ The brief does not contain a statement of the status of all claims, (e.g., rejected, allowed, withdrawn, objected to, canceled), or does not identify the appealed claims (37 CFR 41.37(c)(1)(iii)).
3. ☐ At least one amendment has been filed subsequent to the final rejection, and the brief does not contain a statement of the status of each such amendment (37 CFR 41.37(c)(1)(iv)).
4. ☐ (a) The brief does not contain a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number and to the drawings, if any, by reference characters; and/or (b) the brief fails to: (1) identify, for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function under 35 U.S.C. 112, sixth paragraph, and/or (2) set forth the structure, material, or acts described in the specification as corresponding to each claimed function with reference to the specification by page and line number, and to the drawings, if any, by reference characters (37 CFR 41.37(c)(1)(v)).
5. ☒ The brief does not contain a concise statement of each ground of rejection presented for review (37 CFR 41.37(c)(1)(vi)).
6. ☒ The brief does not present an argument under a separate heading for each ground of rejection on appeal (37 CFR 41.37(c)(1)(vii)).
7. ☒ The brief does not contain a correct copy of the appealed claims as an appendix thereto (37 CFR 41.37(c)(1)(viii)).
8. ☐ The brief does not contain copies of the evidence submitted under 37 CFR 1.130, 1.131, or 1.132 or of any other evidence entered by the examiner **and relied upon by appellant in the appeal**, along with a statement setting forth where in the record that evidence was entered by the examiner, as an appendix thereto (37 CFR 41.37(c)(1)(ix)).
9. ☐ The brief does not contain copies of the decisions rendered by a court or the Board in the proceeding identified in the Related Appeals and Interferences section of the brief as an appendix thereto (37 CFR 41.37(c)(1)(x)).
10. ☐ Other (including any explanation in support of the above items):

**\*\* See attached sheet.**

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Attachment to PTOL-462

#s 5 and 6: The appeal brief states that "the sole issue on appeal is whether there is sufficient written description in the present application to support claim language reciting phospholipids in an amount between 1.0% and 2.0%." This is inaccurate and incorrect. Applicant has missed the fact that there are two separate issues and rejections under 35 USC 112 1<sup>st</sup> Paragraph, and another under 35 USC 112 2<sup>nd</sup> Paragraph. Therefore the Brief does not contain a complete statement of each ground of rejection, nor does it contain an argument for each.

# 7: The copy of the claims in the appeal brief is incorrect. The correct copy is as found in the amendment of March 05, 2004. Specifically, in claim 15, the range of the bilayer forming lipid concentration should be recited as "1.0 % to 2.0 %". Also note that the after-final amendment of 10/28/04 was not entered.

Examiner's Note: This application is not in condition for appeal. The claims are not in condition for appeal, and would not be, regardless of applicant's response to this notice. As stated in the Advisory Action of Nov. 2004, applicant has simply continued to amend the claims to circumvent certain issues, and has not appeared to present a set of claims such that a full and complete assessment and examination may be made. In general, the previous prior art rejections of record would again be applicable to the claims once the 112 1<sup>st</sup> issues have been resolved; these rejections were necessitated by applicant's amendment, and created a situation where an accurate examination of the claims against the prior art could not be made. In other words, the claims to which applicant may eventually be entitled under 35 USC 112, would still not yet be free of the prior art. Thus, this application is not in condition for appeal and applicant is strongly encouraged to pursue other avenues of correcting the claim structure in an attempt to arrive at allowable subject matter. Such avenues may include the filing of an RCE application.



KEITH HENDRICKS  
PRIMARY EXAMINER